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IN THE

Supreme Court of the United States

October Term, 1963

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR. AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners.

Respondents' Brief in Opposition to Petition for Allowance of Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Appendix.

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the lower court correctly deny a motion for new trial under Rule 60(b) of the Federal Rules of Civil Procedure filed more than ten years after the entry of judgment and based solely upon alleged newly discovered evidence, especially where the lower and appellate Courts had repeatedly held in the past that such evidence, even if accepted as true, would constitute no ground for disturbing the judgment?

COUNTER-STATEMENT OF THE CASE

The present motion for new trial under Rule 60(b) of the Federal Rules of Civil Procedure was filed on June 16, 1955, more than ten years after the entry of judgment on November 8, 1944. On November 3, 1955, Judge Welsh of the District Court granted a new trial solely on the averments in the motion, without hearing or depositions: 18 F.R.D. 496. On appeal and petition for writ of mandamus, the Court of Appeals for the Third Circuit in its opinion of May 29, 1956, reported in 234 F. 2d 113, directed the vacation of the order granting a new trial and returned the case to the District Court to (1) consider the jurisdictional question of whether the motion was one which Rule 60(b) empowered it to grant and (2) to hear Petitioner-Defendant's witnesses in support of the motion and give Plaintiffs-Respondents an opportunity to rebut them.

For five and one half years thereafter, Petitioner took no steps to prosecute his motion in accordance with the procedure outlined by the Circuit Court. In October of 1961, the Clerk of the District Court issued a routine notification that since no action had been taken for more than two consecutive years, the pending motion for a new trial would be dismissed unless the Court should otherwise order. Petitioner then filed an application for leave to take depositions in support of his motion, which was granted. At the same time, Judge Layton was assigned to hear and dispose of the matter. The only deposition taken by Petitioner was that of John Pellini, taken on January 26, 1962.

The Statement of the Case in Petitioner's Brief contains many inaccuracies, which need not be enumerated, since the salient facts are correctly summarized in District Judge Layton's opinion (Appendix, pp. 8-16) and in the prior opinions of the Circuit Court cited by him (Appendix, p. 8), especially those reported in 206 F. 2d 259 and 234 F. 2d 113.

The grounds upon which a new trial was sought below were all concerned with evidence allegedly unavailable at the

time of trial and had all been repeatedly rejected by the courts on prior occasions as constituting no basis for relief. Judge Layton held that, assuming solely for the purpose of considering the motion that the facts were precisely as Petitioner alleges (and Respondents vigorously deny), nevertheless they would afford no basis for granting a new trial under Rule 60(b).

ARGUMENT

District Judge Layton's opinions (affirmed per curiam by the Circuit Court) so completely, succinctly and convincingly answer each and every one of Petitioner's contentions that it would be pointless again to answer them here by way of argument. Since Petitioner did not print Judge Layton's opinions in his appendix, they are for the convenience of the Court printed as an appendix to this Brief (pp. 8-17).

Since the Trial Court entered its judgment in this action in November of 1944, Petitioner's efforts to obtain relief have surely established a record for protracted litigation. This is the nineteenth time the matter has been presented to this Court. It has been presented to the United States Court of Appeals for the Third Circuit at least sixteen times, to the United States District Court for the Eastern District of Pennsylvania at least twenty times and on other occasions to both the lower and appellate Courts of the State of Pennsylvania.

The various documents (affidavits, depositions, letters, et cetera) upon which Petitioner now bases his claim for relief have been repeatedly considered by this and other Courts and held no basis for disturbing the judgment. With the exception of Mr. Pellini's 1962 deposition, all but two of the documents upon which Petitioner now relies were originally presented to the Courts well over ten years ago and the two exceptions were first presented to the Courts in 1954. In the Appendix to their brief in the Circuit Court

(pages 10b-16b) Respondents have listed some of the many occasions on which these documents have been previously presented to the Courts.

It has been repeatedly and consistently held that the settled law of a case cannot be altered under Rule 60(b). Even had this Court, the Circuit Court, the District Court and the Pennsylvania Courts erred in their legal conclusions in the past (and, of course, they did not) such error could not now be corrected upon motion for new trial.

> "Litigation must end sometime, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside. Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982; Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 42 S.Ct. 196, 66 L. Ed. 475; Elgin Nat. Watch Co. v. Barrett, 5 Cir., 213 F. 2d 776; Berryhill v. United States, 6 Cir., 199 F. 2d 217; United States v. Kunz, 2 Cir., 163 F. 2d 344": *Collins v. City of Wichita, Kansas*, 254 F. 2d 837, 839 (10th Cir.)

To the same effect are: *Berryhill v. United States*, 199 F. 2d 217, 219 (6th Cir.); *Annat v. Beard*, 277 F. 2d 554, 559 (5th Cir.); *United States v. Polites*, 24 F.R.D. 401, 404 (D.C.E.D. Mich.), and cases there cited. Professor Wright's Law Review Article, quoted at length in Petitioner's Brief, clearly supports the view that Rule 60(b) does not justify "a rehearing of the appellate court's decision" but only the consideration of fraud, mistake, excusable neglect, "or newly discovered evidence not previously known to either court" (Petitioner's Brief, p. 23).

We should also add that the Circuit Court's holding in its prior opinion in the case reported in 234 F. 2d 113, 116, n.5 (referred to by Judge Layton) (Appendix, p. 10) that newly discovered evidence (clause 2) may not be considered as a reason for justifying relief under clause 6 of Rule 60(b) has been unanimously supported by the other courts

which have considered the question: *Klapprott v. United States*, 335 U.S. 601, 613; *United States v. Failla*, 164 F. Supp. 307, 314 (D.C. N.J.); *Wallace v. United States*, 142 F. 2d 240, 244 (2nd Cir.); *Certain-Teed Products Corp. v. Topping*, 12 F.R.D. 406, 408 (D.C. S.D., N.Y.). See also 7 *Moore's Federal Practice*, pages 295, 296 and 309.

Since Mr. Pellini's 1962 deposition is the only addition to the record in many years, it should perhaps be given further comment.

The Circuit Court and the District Court have repeatedly held that, even assuming that an agreement existed between the Integrity Trust Company and Petitioner precisely as Petitioner contended it would not afford any defense against a subsequent holder of the obligation in due course (such as the Federal Deposit Insurance Corporation and the present Use-Plaintiffs) because there was no notation thereof on the records of the Integrity Trust Company at the time the obligation was assigned and it was therefore a "secret agreement" within the meaning of *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation*, 315 U.S. 447. In an effort to overcome this ruling, Petitioner on August 12, 1947, alleged for the first time in a petition for rehearing of the decision of the Circuit Court reported in 163 F. 2d 123 that Petitioner had recently discovered in his files the original notes given the Integrity (which had been returned to him at the time renewal notes were given in December of 1936) and that these original notes bore certain notations which might be construed to refer to an oral side agreement.

The Circuit Court, in its opinion reported in 164 F. 2d 469, held that even if this were so it would not affect the applicability of the *D'Oench, Duhme* decision, since the original notes had been returned to Alker and therefore would not constitute notice to an assignee and since the photostats of the notes which were in the Integrity's records showed no such notations. The Court pointed out that the original notes with the alleged legends had admittedly been in Petitioner's possession at the time of trial, although

allegedly misplaced, and added that it felt it "unnecessary to discuss the theory of FDIC, distinctly antipathetic to that suggested by Petitioner, as to how the legends came to be upon the original notes": 164 F. 2d 471.

On August 9, 1949, Mr. Pellini executed an affidavit, which is printed in Petitioner's Brief in the Circuit Court (pp. 56a-58a), in support of the factual averments respecting the notations on the original notes as made in Petitioner's petition for rehearing which had been filed in August of 1947 and disposed of by the Circuit Court in November of that year as above noted. This 1949 affidavit was first presented to the Circuit Court in November of that year as an addendum to Petitioner's Brief in cases nos. 10,002 and 10,015 (disposed of by opinion reported in 183 F. 2d 429). Mr. Pellini's 1962 deposition, while in some material respects inconsistent with his 1949 affidavit, added nothing in Petitioner's favor either to the earlier affidavit or to the allegations in the petition for rehearing of August, 1947, which the Circuit Court had long since rejected as constituting any basis for disturbing the judgment.

While Judge Layton's opinion completely answers any contention advanced by Petitioner upon the basis of Mr. Pellini's deposition, we cannot fail to add that it is indeed remarkable that if the notations in fact existed, Mr. Pellini failed to mention them in his lengthy deposition taken on January 6, 1947, and filed in the District Court on May 5th of that year in support of a motion to reconsider denial of a motion for new trial, although he claimed in his deposition that he had started a diligent search for the original notes promptly upon his return from the army to Mr. Alker's office in September of 1945 and that he had found them in Mr. Alker's home in Norristown about six months thereafter.

In conclusion, we submit that this Petitioner has, over the past eighteen years, received from the District Court, the Circuit Court, from this Court and from the lower and appellate Courts of Pennsylvania every consideration to which he could possibly make claim. Every contention

which he has advanced has been repeatedly weighed and rejected. It has now been well over fifteen years since he has advanced any theory not repeatedly advanced before. We respectfully submit that further protraction of this litigation imposes an undue burden not only upon Respondents, but upon the Courts.

As long ago as July of 1948, Chief Judge Biggs of the United States Circuit Court of Appeals for the Third Circuit said of this very case: "This interminable litigation must be brought to an end. No useful purpose can be served pursuing it further": 169 F. 2d 336. Now, over fifteen years later, we can only echo this sentiment.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Dated: August 21, 1963.

Respondents' Appendix

OPINION

(Filed June 20, 1962.)

LAYTON, *District Judge.*

This is an action for a deficiency judgment on a note and for other relief. Before the Court is defendants' motion for a new trial under 28 U.S.C.A. Civil Procedure Rule 60(b). This case has had a long history. The trial Court found for plaintiff in 1944 in an unreported opinion. That judgment was subsequently affirmed on appeal. 151 F. 2d 907 (3rd Cir. 1945). Since then, defendants have repeatedly filed various motions for review, certiorari, new trial, etc., which are summarized in the margin, none of which have produced reversal or modification of the original judgment.[1] The present motion for new trial originally was granted by the District Court. 18 F. R. D. 496 E. D. Pa. (1955), but the Third Circuit Court issued a peremptory writ of mandamus commanding that the District Court order granting the new trial be vacated. At the same time, the Third Circuit Court filed a detailed opinion prescribing the nature of any

[1] The following is a partial list of court opinions dealing with the facts at bar: Judgment for plaintiff affirmed, 151 F.2d 907 (3rd Cir. 1945). Certiorari denied, 327 U.S. 799 (1946); five petitions for rehearing denied, 328 U.S. 877, 879, 881; 329 U.S. 823, 830 (1946). Petition for Bill of Review denied, 163 F.2d 123 (3rd Cir. 1947); Petition for rehearing denied, 164 F.2d 469 (3rd Cir. 1947); Petition for rehearing denied, 169 F.2d 336 (3rd Cir. 1948); certiorari denied, 336 U.S. 953 (1949). Order granting new trial set aside, 183 F.2d 429 (3rd Cir., 1950); two petitions for certiorari denied, 340 U.S. 917, 939; Mandamus issued directing Judge Welsh to vacate Order granting new trial, 206 F.2d 259 (3rd Cir. 1953); four petitions for certiorari denied, 346 U.S. 925; 347 U.S. 924, 940; 348 U.S. 939. Mandamus, which was issued at 206 F.2d 259, vacated, 223 F.2d 262 (3rd Cir. 1955). New trial granted, 18 F.R.D. 496 (E.D. Pa. 1955); Mandamus issued vacating order granting new trial, 234 F.2d 113 (3rd Cir. 1956).

future proceedings on the motion. 234 F. 2d 113 (3rd Cir. 1956). This latest opinion of the Circuit Court is the law of the case, and governs the decision here.

In that opinion, the Circuit Court directed this Court to determine first of all whether it has jurisdiction even to consider a motion for new trial. It is clear from the Circuit Court's opinion that power to grant a new trial here must be found, if at all, within the four corners of 28 U.S.C.A. Civil Rule 60(b). 234 F. 2d at 115. Rule 60(b) provides as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655,

> or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

In the case at bar, the Court may not consider a motion for new trial under clauses (1), (2) and (3) of the Rule (i.e., because of mistake, newly discovered evidence, or fraud) because the express terms of Rule 60(b) provide that a motion for new trial under these clauses may not be made more than one year after the judgment was entered. And the Court is powerless to extend the one year time limits imposed. Federal Civil Rule 6(b) provides:

> "When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . order the period enlarged . . . *but it may not extend the time for taking action under rules . . . 60(b) . . .* except to the extent and under the conditions stated [therein]." (Emphasis supplied.)

The present motion for new trial was made on June 16, 1955, more than 10 years after the trial Court's judgment, which was entered on November 8, 1944. It follows, then, that the only grounds for new trial available to the defendants are clauses (4), (5), and (6) of Rule 60(b).

Defendants have offered no evidence to prove that the judgment is void (clause 4), or that the judgment has been discharged, or satisfied (clause 5). The inquiry is thus greatly narrowed. Power to consider defendants' motion for new trial must be found, if at all, under clause (6) of Rule 60(b)—"any other reason justifying relief." And in deciding whether defendants have satisfied the standards of Rule 60(b)(6), the Circuit Court has made it clear that this Court "may not consider as reasons justifying relief under clause (6) mistake, inadvertence, surprise, excusable

neglect, newly discovered evidence or fraud, the reasons justifying relief under clauses (1), (2) and (3) of Rule 60(b)." 234 F. 2d at 116 n. 5.

At a conference, defendants were asked what evidence they would offer at a full hearing of witnesses on the motion, should this Court determine that the allegations in the motion furnish grounds to proceed with such a hearing. Defendants expressly stated they would offer nothing more than the evidence of witnesses whose affidavits and depositions are already of record, and the deposition of one John Pellini, also in the record. The only purpose of a hearing would be to test the credibility of these witnesses. Since this Court is here ruling only on the sufficiency of the allegations, all questions of credibility and fact will be resolved in a light most favorable to the moving party. Use-plaintiffs contend that even if all defendants' allegations are true (which use-plaintiffs vigorously deny), the motion for new trial nevertheless does not meet the minimum requirements of Rule 60(b)(6).

The following facts are alleged by the defendants in support of their motion, and are accepted by the Court (for purposes of this ruling alone) without question.

In October, 1929, Harry J. Alker, Jr., an attorney, had a large broker's loan secured by marketable collateral. The Integrity Trust Co. took the loan over from the broker, and Alker gave two demand notes totaling $592,150 to the Integrity Trust Co. In 1931, the collateral became insufficient and Alker gave new demand notes, in the amounts of $350,000 and $242,150 respectively, secured by additional collateral. Some of the additional collateral was supplied by a friend of Alker, one A. A. DuBan, whose widow and Executrix is a nominal party in this action. The heart of Alker's case lies in his contention that there was an enforceable agreement between himself, DuBan and Integrity providing that Integrity would not "disturb" the loan or the collateral until security values had risen to such a point that Alker could recover his "equity." The Court here assumes that such an agreement existed, although other

reviewing courts, and use-plaintiffs have pointed to persuasive evidence that it did not. See 151 F. 2d 907, 908 (3rd Cir. 1945); 164 F. 2d 469, 470 (3rd Cir. 1947). On the back of the 1931 notes, there appear terse legends, which are the only written evidence of the nature of the agreement, assuming that it existed:

> "For addtl. collateral and agreement with Alker and A. A. DuBan see other note and W. K. H."

On the other note is a legend which states:

> "For addtl. collateral and agreement with Mr. Alker and A. DuBan see W. K. H."

"W. K. H." was an officer of the Integrity Trust Co., the holder of the notes.

In December 1936, the collateral again became insufficient. A new demand note was given by Alker to replace the 1931 notes, additional stock was put up by DuBan, and an insurance policy was procured upon Alker's life, as further collateral. The 1936 note in the amount of $592,150 was given in "substitution and continuance" of the two 1931 notes. But no mention was made in the 1936 note of any agreement between Integrity and Alker. The 1931 Notes, with the legends on the back, were returned to Alker in January 1937, and remained in his exclusive possession thereafter.

In 1941, Integrity assigned the 1936 Note and collateral with its other banking assets to the Federal Deposit Insurance Corporation (FDIC) as security for a loan of approximately $20,000,000. The FDIC continued to receive interest on the Alker loan, certain assigned legal fees, and the benefit of the insurance policy on Alker's life. In 1943,

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[2] However, these typed legends do not appear on photostats of the notes made by Integrity before the notes were returned to Alker in January, 1937. Since the Court is assuming here that legends are authentic, it is unnecessary to discuss the theory of FDIC, distinctly antipathetic to that suggested by Alker, as to how the legends came to be upon the 1931 notes. See 164 F.2d 469, 470-71 (3rd Cir. 1947).

the FDIC, as Liquidator, after notice, sold the collateral, and brought this action to recover the deficiency on the 1936 Note. Alker claims the collateral was sold in violation of the agreement between himself and Integrity; and that the FDIC was bound by that agreement. He has demanded that the sale of the collateral by FDIC be rescinded since appreciation of the security values since the time of the sale in 1943 would have more than paid off the deficiency.

It is apparent from the foregoing that the existence of, and the nature of the alleged agreement between Alker and Integrity is at the heart of defendants' case. The difficulty with defendants' position is that all the arguments and evidence presented in this motion for new trial have been considered and rejected by previous courts. No essential argument presented here is new. The trial Court found that the alleged agreement between Alker and Integrity was lacking in essential "certainty as to proof and certainty as to the time of performance." The Circuit Court, on appeal, implied doubt that the agreement even existed, but, assuming that it did exist, found that it was a secret understanding between Integrity and Alker and was, therefore, not binding on the FDIC under the rationale of D'Oench, Duhme & Co. v. FDIC, 315 U. S. 447 (1942), 151 F. 2d 907 (3rd Cir. 1945). It was only at this point that Alker produced the 1931 Notes with the terse legends on the back. Apparently, these legends are supposed to demonstrate that the agreement was not secret, and therefore that the FDIC is bound by its terms. The Circuit Court has rejected this very argument in a detailed opinion, 164 F. 2d 469 (3rd Cir. 1947), in which it pointed out that these notes were exclusively in Alker's possession after January 1937. At no time, were they available to the FDIC who did not take over the affairs of the Integrity Trust Co. until 1941. The FDIC cannot be bound by writings which it never had an opportunity to see.

The 1931 Notes (with the legends) were not offered by Alker as evidence at the trial. Alker relies heavily on a deposition of a former office employee, John Pellini, to show

that the 1931 Notes were misfiled at the time of the trial, and were not found until after the judgment had been entered. But John Pellini's testimony does little more than explain why Alker did not introduce the 1931 Notes into evidence at the trial, and to buttress the authenticity of the legends on the back of the 1931 Notes. Whatever the significance of the legends, the facts conceded by Alker show conclusively that the FDIC never had any opportunity to see them. It may be that Integrity was negligent in keeping no record of the existence of an agreement not to liquidate collateral. Certainly, it is a fact that no evidence of such an agreement appears in the minutes of the bank or in any correspondence between Integrity and Alker concerning the loan. It is significant that the bank examiner, C. B. Matsinger, failed to mention the existence of an agreement not to liquidate collateral in his written reports of the condition of Alker's loan which he prepared during an examination of Integrity's accounts. But even if we assume arguendo, that Integrity was negligent in keeping its records, such negligence cannot be imputed to the FDIC without a showing that FDIC had notice of the agreement in some way. 164 F. 2d 469, 470. None of the evidence furnished by defendants shows that the FDIC had written notice of the agreement. Even if all of the defendants' evidence is believed, and even if the legends on the 1931 Notes are authentic, the result of the case is not changed. Whatever the agreement may have been, if in fact there was an agreement at all, it was still a secret one so far as the FDIC was concerned, and therefore was unenforceable against them. D'Oench Duhme & Co. v. FDIC, 347 U. S. 115 (1942); FDIC v. Alker, 164 F. 2d 469 (3rd Cir. 1947).

It is well settled that relief from final judgments under Rule 60(b)(6) may be granted in unusual and exceptional cases only. Federal Deposit Ins. Corp. v. Alker, 234 F. 2d 113, 117 (3rd Cir. 1956); John E. Smith's Sons Co. v. Latimer Foundry & Machine Co., 239 F. 2d 815, 817 (3rd Cir. 1956). This rule is needed to buttress the finality of

judgments There must be an end to litigation. Only extraordinary circumstances strongly moving the discretion of the Court can justify relaxation of this policy in a particular case. See generally, 7 Moore, Federal Practice ¶60.27 at 293-312 (1954). The requirements are particularly strong in motions invoking Clause (6) of Rule 60(b) when the motion is made more than a year after the judgment was entered. Clause (6) is a residual clause to be invoked only on the basis of some reason other than those specified in the preceding clauses (1)-(5). 7 Moore, Federal Practice ¶60.27[2] at 300 (1954). Without such a restriction, Clause (6), which may be invoked at any "reasonable" time, could be used to evade the rigid one-year time limitation on bringing petitions under Clauses (1)-(3). For examples of cases where the allegations in the petition satisfied the jurisdictional requirements of Rule 60(b)(6), see Klapprott v. U. S., 335 U. S. 601, 336 U. S. 942 (1949) (denaturalization decree entered by default more than a year previously against petitioner who could not defend himself at that time because of incarceration, poverty, and illness); In re Estate of Cremidas, 14 F. R. D. 15 (D. Alaska 1953) (minor's attorney was so incapacitated by drunkenness at the trial that her claim was in effect not presented). See also U.S. v. Karahalias, 205 F. 2d 331 (2d Cir. 1953). This Court has found nothing in the allegations in the motion at bar to bring it within the rule of the cited cases. None of the contentions made by defendants are even new. All substantial points have been considered and rejected by other courts, as is revealed quickly by reading previous opinions of this Court and of the Third Circuit Court cited herein. Of additional importance here is this fact: even if all of defendants' allegations are believed, defendants still have shown no legal defense to the claim. Thus, a new trial would produce only further delay with no possibility of a change in result.

The defendants also argue that this Court has no power to hear this matter, apparently because the Judge is a United States District Judge for the District of Dela-

ware, not of the Eastern District of Pennsylvania. But this Court was specifically assigned by Chief Judge Biggs to hear and dispose of this matter. There is no merit to defendants' contention.

Motion for new trial denied.

MEMORANDUM OPINION

LAYTON, *District Judge.*

On June 19, 1962, this Court filed an opinion denying defendants' motion for a new trial. On or about June 30, 1962, defendants filed their motion for re-argument, and on or about July 2, 1962, defendants filed a supplemental motion for re-argument.

The first reason assigned as error in defendants' motion for re-argument is the assignment of Judge Layton of the United States District Court for the District of Delaware to reconsider and dispose of defendants' new trial motion when Judge Welsh, who originally heard the entire matter, is still available. Inasmuch as this Court in the first instance did not clearly grasp the defendants' argument relative to this assignment of error, it is felt desirable to dispose of it very briefly.

Defendants' contention is based on decisions of the Third Circuit Court of Appeals in TCF Film Corp. v. Gourley, 240 F. 2d 711, and United States v. Wheeler, 256 F. 2d 745. The rationale underlying the holdings in the two cited opinions is that judges should refrain from involving themselves in a situation where in deciding a matter they may be required to overrule the decision of a judge of the same court in the same case.

However, the facts here clearly differ from those in the cited opinions. In the case at bar, Judge Welsh has retired and spends long periods of time each year away from Philadelphia. Judge Layton was assigned generally by Chief Judge Biggs to hear cases in the Eastern District of

Pennsylvania and specially assigned by Chief Judge Clary on December 8, 1961, to hear this case. At the time Judge Layton was assigned to hear this case, Judge Welsh, even had he been in Philadelphia, was restricted by order of Chief Judge Biggs dated December 4, 1961, to hear the following type of cases: (1) General Naturalizations, (2) Uncontested Motions, and (3) Matters Appearing on Argument List.

Should there be any question whether or not this case fell under category three, "Matters Appearing on Argument List", this was dispelled by a further order of Chief Judge Biggs dated December 28, 1961, (entered before Judge Layton held any hearings in the instant case) amending the order of December 4, 1962, by limiting the matters which Judge Welsh could hear to "Naturalizations" and "Uncontested Motions" only.

It follows that when this Court heard and disposed of this case, Judge Welsh was not available within the meaning of United States v. Wheeler, above cited. This reason for new trial is denied.

As to each and every other of the grounds raised in defendants' motion and supplementary motion for new trial, said motions have been considered and are herewith denied.

Dated: July 11, 1962.